Supreme Court, U.S.
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No. 92-935

In The

Supreme Court of the United States

October Term, 1992

SETH WARD,

Petitioner,

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR MADISON GUARANTY SAVINGS AND LOAN ASSOCIATION AND MADISON FINANCIAL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

I.

Respondents' argument in support of the Eighth Circuit's dangerously flawed analysis of *res judicata* is predicated entirely on the false premise "that the state court did not address or resolve the jurisdictional question." Respondents' Brief at 7. To create the illusion that the record in this case supports that false premise, Respondents' statement of the case provides an incomplete and factually erroneous characterization of the events and issues that led the Arkansas Court of Appeals, *on two separate occasions*, to fully and fairly adjudicate the "jurisdictional question" in the context of deciding Ward's motion to dismiss the appeal.

First, Respondents' state that their response to Ward's motion to dismiss the appeal was limited to "explaining [to the Arkansas Court of Appeals] that their removal of the case to federal court divested the state court of jurisdiction." Respondents' Brief at 3. In fact, subheading "A" of Respondents' response was captioned "Appellee's [Ward's] Motion to Dismiss Appeal or Affirm Judgment Fails to State Any Substantive Basis for Granting the Motion." Pet. App. 29a. Under that subheading, Respondents argued that the Arkansas Court of Appeals should assume subject matter jurisdiction over the proceeding for purposes of *denying on the merits* Ward's motion to dismiss. *Id.* at 29a-32a. Subheading "B" of their response was captioned "28 U.S.C. §1446(d) Operates As a Statutory Stay of Any Further Proceedings in This Court As Of September 25, 1989" and set forth the *alternative argument* that the state court lacked subject matter jurisdiction over the proceeding. *Id.* at 32a. Nevertheless, in their prayer for relief, Respondents requested the Arkansas Court of Appeals to "*deny* Appellee's Motion to Dismiss Appeal or Affirm Judgment and [to grant] the RTC and Madison Financial . . . such other and further

relief to which it may show itself entitled." *Id.* at 33a. Thus, on its face, Respondents' response to Ward's motion to dismiss the appeal specifically requested the state appellate court to assume subject matter jurisdiction over the proceeding for purposes of deciding that motion *on the merits.*

On October 25, 1989, the Arkansas Court of Appeals did precisely what Respondents had requested it to do: The court reached and decided *on the merits* Ward's motion to dismiss the appeal. In doing so, the state appellate court unquestionably *considered* and *rejected* Respondents' argument that it had been divested of subject matter jurisdiction by the removal of the proceeding to the district court.*

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* The Arkansas Court of Appeals undoubtedly took careful note of the fact that it was Respondents, *the removing parties,* who had: (a) *voluntarily returned* to state court after removing the appeal to the District Court; (b) reinvoked its jurisdiction by petitioning it to release the original record; and (c) filed a response to Ward's subsequent motion to dismiss the appeal that requested it to assume jurisdiction over the case for purposes of deciding that motion.

As this Court first noted over a century ago, the federal removal statutes do *not* contemplate that the removing party can "experiment" on his case in state court and, upon an adverse decision, seek refuge in federal court:

> Further to sustain this removal would certainly violate the spirit of the removal acts, which do not contemplate that a party may experiment on its case in the state court, and, upon an adverse decision, then transfer it to the federal court. Here Rosenthal . . . has experimented with the state court and been beaten, and now seeks a different forum.

Rosenthal v. Coates, 148 U.S. 142, 147-48, 13 S.Ct. 576, 577, 37 L.Ed. 399 (1892). Because Respondents voluntarily returned to the Arkansas Court of Appeals to "experiment" on their case, they waived their federal forum.

Second, Respondents' statement of the case and argument leave a crucially important chapter in the procedural history of this case untold and unaddressed. On October 31, 1989, the District Court denied Respondents' emergency motion for an injunction vacating the Arkansas Court of Appeals' October 25, 1989 mandate dismissing the appeal. Pet. App. 44a-51a. Incredibly, thirteen days later, Respondents again *voluntarily returned* to the Arkansas Court of Appeals and again invoked that court's jurisdiction by filing a pleading captioned: "Petition For Rehearing And For Recall Of Mandate Or, In The Alternative, Motion For Reconsideration." *Id.* at 52a-59. This petition was devoted entirely to arguing that the Arkansas Court of Appeals should reconsider the issue of its subject matter jurisdiction and recall the mandate dismissing the appeal. Ward filed a response arguing that the state court had properly adjudicated the issue of its subject matter jurisdiction. *Id.* at 60a-69a.

On November 29, 1989, after fully and fairly considering *for the second time* the question of its subject matter jurisdiction, the Arkansas Court of Appeals entered an order denying Respondents' motion to recall the mandate or to reconsider its resolution of the jurisdictional issue. *Id.* at 70a-71a. In short, while reasonable minds might disagree on whether the Arkansas Court of Appeals "correctly" adjudicated the issue of its subject matter jurisdiction, there can be *no dispute* concerning its full and fair adjudication of that issue.

The Eighth Circuit's *res judicata* analysis focused exclusively on whether the Arkansas Court of Appeals had "correctly" adjudicated the issue of its subject matter jurisdiction. As a result, the Eighth Circuit cited 28 U.S.C. 1446(d) to end, rather than to begin, its inquiry into whether Respondents' voluntary post-removal conduct before the Arkansas Court of Appeals resulted in a full and fair adjudication of the jurisdictional issue in the state court forum. *Id.* at 4a. Because the Eighth Circuit's

refusal to give *res judicata* effect to the Arkansas Court of Appeals' final mandate undercuts the very foundation of that critically important doctrine, conflicts with a long line of decisions by this Court, and makes a mockery of full faith and credit and considerations of comity between state and federal courts, this error warrants the Court granting plenary review.

II.

To escape this Court's holdings in *Moitie, Ackermann, Angel,* and *Reed,* Respondents make the formalistic argument that those cases have no application because Respondents did not initiate a "new action" in the District Court after the Arkansas Court of Appeals entered its October 25, 1989 mandate. This Court, in applying that aspect of the doctrine of *res judicata* which requires the exhaustion of direct appellate remedies, repeatedly has rejected similar arguments aimed at elevating form over substance.

Respondents unquestionably abandoned all of their direct state and federal remedies for challenging the merits of the Arkansas Court of Appeals' October 25, 1989 mandate. As a result, Respondents allowed that mandate and Ward's underlying fully satisfied state court judgment to become *final.* Nevertheless, on July 11, 1991, some twenty-one months after the entry of the state court mandate, Respondents launched a collateral attack in the District Court, which sought to vacate and set aside both the state court mandate and Ward's now final, fully satisfied state court judgment. This clearly constituted an attempt by Respondents to relitigate in a *new proceeding* and *different forum* issues which they had lost in the earlier and now finally concluded proceeding before the Arkansas Court of Appeals. Since this Court has specifically proscribed such conduct in the foregoing line of cases, plenary review is required to close the Eighth

Circuit's novel "collateral attack" exception to the doctrine of *res judicata*.

III.

Notwithstanding Respondents' best efforts, it simply is impossible to reconcile the muddle of conflicting decisions by state and federal appellate courts on the circumstances under which the RTC can assert its *D'Oench* and Section 1823(e) defenses for the first time in a post-judgment appeal. This situation will continue to worsen until the Court addresses that issue and provides badly needed guidance on what has become, in the words of one appellate court, "the dungeon of *Duhme*." *Bowen v. FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990). The Court should grant plenary review so that the compelling facts in this case can be used as the basis for providing that guidance.

CONCLUSION

The petition for writ of certiorari should be granted on all questions presented for review.

Respectfully submitted,

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